Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

DAVID A. MONTS,
Petitioner

vs.

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AGRICULTURAL AND MECHANICAL COLLEGE D/B/A UNIVERSITY OF NEW ORLEANS, PATRICK M. GIBBS, FRANK H. SCHAMBACH, AND GUSTAVE S. CANTRELL,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a professional engineer's communications to his state government employer and its attorneys, such as reports of fire and safety code violations and the unauthorized practice of engineering, are protected free speech under the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Louisiana Supreme Court were:

- David A. Monts, petitioner;
- Board of Supervisors of Louisiana State University and Agricultural and Mechanical College d/b/a University of New Orleans, respondent;
- Patrick M. Gibbs, respondent;
- Frank H. Schambach, respondent;
- Gustave S. Cantrell, respondent;

The following filed an *amicus curiae* brief in the Louisiana Supreme Court:

- National Society of Professional Engineers; and
- Louisiana Engineering Society.

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The Order of the Supreme Court of Louisiana denying petitioner's application for writs of certiorari, mandamus, or review in *Monts v. Board of Supervisors of L.S.U., et al.* is reported at 2002-0926 (La. 5/31/02), 817 So.2d 105, and is reprinted in Appendix A at page A-1.

The opinion of the Louisiana Fourth Circuit Court of Appeal in *Monts v. Board of Supervisors of L.S.U., et al.* is reported at 2001-1497 (La. App. 4 Cir. 2/27/02), 812 So.2d 787, 164 Ed. Law Rep. 500, and is reprinted in Appendix B at page A-2.

The Judgment and Reasons for Judgment of the Civil District Court for the Parish of Orleans, State of Louisiana in "David A. Monts vs. Board of Supervisors of L.S.U., et al.," No. 97-12325, Div. "D," are not reported, but are reprinted in Appendix C at page A-10 and Appendix D at page A-12, respectively.

JURISDICTION

The Supreme Court of Louisiana rendered its decision denying petitioner's application for writs of certiorari, mandamus, or review on May 31, 2002. Petitioner filed a motion for reconsideration in the Louisiana Supreme Court on June 14, 2002, but a motion for reconsideration of a denial of an application for a writ is discretionary and does not extend the time for filing a petition for certiorari in this Court, and as of this date the Louisiana Supreme Court has not issued a ruling on petitioner's motion for reconsideration.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) to review the decision of the Supreme Court of Louisiana, the highest court of Louisiana in which a decision could be had, in this suit for redress under 42 U.S.C. § 1983 for violation of petitioner's right to freedom of speech under the First and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition for certiorari involves the following federal constitutional and statutory provisions, pertinent portions of which are reprinted in Appendix E: U.S. Const. Amend. I (Append. E, p. A-22); U.S. Const. Amend. XIV (Append. E., p. A-22); 42 U.S.C. § 1983 (Append. E., p. A-22).

This petition for certiorari involves the following state statutes and regulations, pertinent portions of which are also reprinted in Appendix E: La. R.S. 40:1721 *et seq.*, Louisiana Building Code for State Owned Buildings Law (Append. E, p. A-22); La. R.S. 37:681 *et seq.*, Louisiana Registration Law for Professional Engineers and Land Surveyors (Append. E, p. A-24); LAC 46:2101 *et seq.*, Rules of Professional Conduct for Professional Engineers and Land Surveyors (Append. I, p. A-26).

STATEMENT OF THE CASE

Background

From January 7, 1991 to July 15, 1996, petitioner David A. Monts ("Monts") was employed as an Electrical Engineer in the Department of Physical Plant Services ("PPS") of the University of New Orleans ("UNO"), a Louisiana public university governed by respondent Board of Supervisors of Louisiana State University and Mechanical College ("Board of Supervisors"). During that time, the Director of PPS was respondent Frank H. Schambach ("Schambach"), who reported to the Vice Chancellor for Business Affairs, respondent Patrick M. Gibbs ("Gibbs"). Initially, respondent Gustave S. Cantrell ("Cantrell") was the Assistant Director of PPS under Schambach, but beginning in about October 1991, Schambach unofficially divided responsibility in PPS between Cantrell, a civil engineer whom Schambach placed in charge of "Capital Outlay Projects," and John Michael Parnon ("Parnon"), a licensed architect whom Schambach placed in charge of "Special Projects" and who, in September 1995, acquired the official title of "Manager of Facility Renovations and Design."

Monts reported directly to Parnon during most of the period of his employment.

At the time UNO hired Monts in January 1991, Monts's qualifications included a Bachelor of Science degree in Physics and Chemistry from Eastern Illinois University in 1969; a Master of Science degree in Nuclear Engineering from the University of Illinois in 1971; completed course work for a Ph.D. degree in Nuclear Engineering at the University of Illinois in 1972-73; course work in electrical technology at Central Virginia Community College in 1975-77; completed power course work in electrical engineering at the University of Virginia in 1978-80; registration in Virginia as a Professional Engineer in Nuclear Engineering in 1975; registration in Louisiana as a Professional Engineer in Electrical Engineering in 1983; and approximately fifteen years of work experience in nuclear and electrical engineering.

Whistleblowing

During his employment at UNO, Monts attempted to expose government misconduct perpetrated by his nominal superiors on the UNO campus. These nominal superiors were Monts's higher supervisors, respondents Gibbs, Schambach, and Cantrell, and not his direct supervisor, Parnon. Monts made serious charges against respondents to UNO's attorneys and requested a complete independent investigation of his charges. UNO's attorneys encouraged Monts to reveal all he knew about the operations of PPS.[1]

The most serious charges Monts made to UNO's attorneys were: (1) Schambach practiced architecture and engineering without a license and allowed other unlicensed persons, including Cantrell, to practice architecture and engineering, and this practice jeopardized the health and safety of the public; (2) Schambach and Cantrell failed to take corrective action concerning fire, electrical, and building code violations, and this practice jeopardized the health and safety

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[1] See the affidavit of Monts and accompanying exhibits (Append. F, p. A-28).

of the public; (3) Gibbs and Schambach did not comply with State bid law; and (4) Gibbs and Schambach did not comply with State hiring law. Monts had direct evidence supporting charges (1) and (2), which were matters within his expertise as a licensed professional electrical engineer.

The evidence shows that respondents knew Monts was going to the UNO attorneys, knew of the complaints Monts was making about their unlawful and improper acts, and, more importantly, knew Monts was requesting the attorneys to launch an investigation to determine the extent of the misconduct. To silence Monts and prevent an investigation, respondents terminated Monts's employment on July 15,1996, stating that Monts was "disruptive at weekly staff meetings" and that Monts had a "negative attitude with regards to your employment" (Append. I, p. A-94). Later, in answers to interrogatories, respondents added another purported reason for firing Monts: Monts "attempted to cause disruption in the workplace when he copied the salaries of his co-workers from the Library and distributed the information within the Department." No investigation into Monts's allegations was ever conducted either before of after Monts's termination.

The contention that Monts was fired because of his whistleblowing activities is supported by the following facts:

- The unlawful and improper acts were witnessed and corroborated by two other professional engineers, Anderson and Ehlers.[2]
- Monts's termination prevented an investigation of his charges, and thus a cover-up of respondents' activities was assured.
- Contrary to respondents' denials that they knew of the meetings between Monts and the UNO attorneys until after Monts was fired, the following evidence demonstrates otherwise:

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[2] See the affidavits of Ehlers (Append. G, p. A-84) and Anderson (Append. H, p. A-90).

- The UNO attorneys sent billing statements to respondent Gibbs naming Monts as the UNO client and charging UNO for over 30 hours of legal services related to Monts.

- In depositions, the UNO attorneys have taken the position that "Mr. Monts was not a client. The University was the client." Additionally, respondents have asserted the attorney-client privilege with respect to communications between the UNO attorneys and UNO about Mr. Monts.

- The UNO attorneys have an ethical and legal obligation to report their activities to their client, UNO.

- One of the UNO attorneys, David Korn, telephoned Monts on July 17, 1996, two days after Monts was fired and two days before a third meeting between Monts and the attorneys was scheduled to take place on July 19, 1996. During the telephone conversation, Korn stated that because Monts was on "administrative leave" there was the possibility of the UNO Attorneys having to represent UNO in the matter, therefore the attorneys believed it best to cancel the July 19, 1996 meeting. This fact demonstrates the UNO attorneys were aware of Monts's firing, which included a thirty-day "administrative leave." Thus, respondents were in communication with the UNO attorneys about the matters which Monts brought to their attention.

- Parnon, Monts's immediate supervisor, had direct knowledge of Monts's meetings with the UNO attorneys because Parnon gave Monts permission to leave work to attend the meetings, Parnon assisted Monts in preparing materials for use at the meetings, and Monts told Parnon about the results of the meetings.

- Schambach, who was Parnon's immediate supervisor, knew of the meetings because Parnon testified he "may have" mentioned the meetings to Schambach, and also because prior to Monts's termination, Ehlers overheard Schambach angrily telling someone on the telephone,"Dave went to go see an attorney!"

- Gibbs knew of the meetings because the UNO attorneys sent their billing statements to Gibbs.

- At Parnon's departmental meetings the subject of Monts's meetings with the UNO attorneys was discussed. Thus, in addition to Parnon, Schambach, and Gibbs, numerous other UNO and PPS employees knew about the meetings.

• The reasons respondents give for firing Monts are pretextual as shown by the following facts in evidence:

- When questioned in depositions, respondents Cantrell, Schambach and Gibbs could not identify a single specific incident or produce a single document where Monts was either "disruptive" or demonstrated a "negative attitude." In fact, Cantrell admitted he never witnessed Monts's "negative attitude with regard to his employment." On the other hand, Anderson and Ehlers state that "Monts never 'disrupted' a departmental meeting in any way or otherwise interfered with his co-workers' performance of their duties," and further that "Monts was never reprimanded, counseled, or otherwise disciplined for his behavior or performance . . . nor did Monts's behavior ever warrant a reprimand, counseling, or discipline."

- The salary/staffing issue is a red herring. In about October 1994, Parnon placed Monts in charge of interviewing applicants for the position vacated by electrical engineer Anderson. After a series of qualified engineers rejected offers for the position because of the low salary offered, Monts researched and copied by hand an excerpt from the "UNO 1995-96 Budget," including employee salary and merit increase information, from the public record in the UNO library. Shortly thereafter, in December 1995, at a weekly staff meeting called by Parnon, Parnon and his staff addressed the staffing issues of his group and it was again noted that a replacement for Anderson still had not been found mainly because of the low salary offered. At that time, Monts mentioned that he had researched the UNO and PPS budget and salary information from the UNO library, and Monts provided copies to Parnon and three members of his staff at their request. The incident was raised by Alan Heintzen (UNO-PPS Manager, Administration and Training) at the pretermination hearing on July 15, 1996 when Heintzen asked

why Monts gave members of the UNO-PPS staff copies of the annual salary of various UNO employees. The issue was briefly discussed by Monts, Schambach, and Parnon, but as Parnon had approved of the distribution of the budget and salary information and the incident occurred long before in December 1995, all parties were satisfied that this issue was of no importance. That the issue had so little impact and was dismissed as irrelevant is demonstrated by the fact that later on the same day of the pretermination hearing (July 15, 1996), the termination letter was written and this issue is not even mentioned in the letter. On the same day, Schambach was upset that Monts did not resign, but instead required Schambach to fire Monts. If Schambach thought he could use this issue against Monts, most certainly, given his attitude on July 15, 1996, he would have raised the issue in the termination letter. The issue was again introduced only in an answer to an interrogatory two years after Monts's termination and over two and a half after the incident occurred.

- Schambach, Cantrell, Parnon, Anderson and Ehlers all agree that Monts's electrical engineering work was excellent.

- Monts had no previous warning that he would be disciplined, let alone terminated, and was given no second chance to improve his performance by Schambach at the pretermination hearing. This indicates that the UNO administrators were in a hurry to remove Monts.

- Respondents have not produced any evidence that Monts's speech disrupted the efficient functioning of UNO or PPS.

State Court Proceedings

On July 14, 1997, Monts filed suit against respondents the Board of Supervisors d/b/a UNO, Gibbs, Schambach, and Cantrell in the Civil District Court for the Parish of Orleans, State of Louisiana for redress under 42 U.S.C. § 1983 for

violating his right to freedom of speech secured by the First and Fourteenth Amendments to the U.S. Constitution.[3]

Specifically, in the Civil District Court for the Parish of Orleans, State of Louisiana, Monts alleged the following in Paragraph IX of his "Petition for Damages":

> Acting under color of State law, the defendants jointly, intentionally and willfully deprived the plaintiff of his constitutional and Federal law rights and privileges including but not limited to the right to free speech as protected by the First Amendment of the Constitution of the United States and whose unlawful actions were in violation of 42 U.S.C Sections 1983 and 1985.

The state district court granted respondents' motion for summary judgment and dismissed Monts's First Amendment retaliation claim in a Judgment dated May 9, 2001 (Append. C, p. A-10), reasoning as follows in its Reasons for Judgment (Append. D, p. A-12):

> Plaintiff alleged that he was wrongfully discharged in retaliation for exercise of his First Amendment rights of free speech. To make a claim under the First Amendment, a plaintiff must establish that his speech was "protected", such that it was a matter of public concern warranting First Amendment protection. In addition, the "employee must demonstrate that his protected conduct was a substantial motivating factor in his discharge." *Coughlin v. Lee*, 946 F.2d 1152 (La. App. 5th Cir. 1991). In

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[3] Monts asserted various other causes of action under state law but expressly and voluntarily abandoned them in the state district court and on appeal.

> this case the substantial motivating factor in plaintiff's discharge was his disruptive behavior, negative attitude and divisive actions in disseminating information concerning the salaries of co-employees and his superiors. The Court found that although the First Amendment may have protected plaintiff's speech, his actions clearly justified his termination.

(Append. D, p. A-20).

In the Louisiana Fourth Circuit Court of Appeal, Monts asserted and argued the following assignment of error in his original brief filed on September 24, 2001:

> The Trial Court erred in granting defendants' motion for summary judgment dismissing Mr. Monts's claims for wrongful discharge in violation of U.S. Const. Amends. I and XIV and 42 U.S.C. § 1983.

Monts also specified and addressed the following issue in his brief to the court of appeal:

> Whether Mr. Monts's speech addressed matters of public concern.

In an opinion issued on February 27, 2002 (Append. B, p. A-2), the Louisiana court of appeal addressed the federal constitutional issue as follows:

> In the instant case, review of the alleged code violations with which Monts was concerned--if they were code violations at all--cannot be said to be major matters of public safety. Monts complained of wire size, plumbing, and leveling issues and the like. It would not appear that, even if they were

> present, these seemingly minor deviations from the purest building practices suggest great threat to the public health and safety. The four instances of allegedly 'protected speech' that Monts cites signify his dissatisfaction in his workplace, and are not matters sufficiently infused with public interest to support his First Amendment retaliation claim. Additionally, the context and form of Monts's expression militate against the finding that he was addressing matters of public concern as a citizen, rather than as a disgruntled employee. With the exception of the communication with [defendants'] counsel (of which defendants were allegedly unaware), all of Monts's complaints, either verbal or in memoranda, were internal and more specifically, internal within the Physical Plant Services Department. He made no complaints to other UNO officials, nor did he report the purported misconduct to the State Board of Ethics, which, as explained in the Staff Handbook, he had the full right to do. Accordingly, it is apparent that Monts's internal complaints were not primarily matters of public concern, and thus, not protected speech. As such, under *Coughlin* [*v. Lee*, 946 F.2d 1152 (5th Cir. 1991)], we need not address any of the other issues presented by plaintiff, since without protected speech, there can be no violation of the First Amendment. This assignment of error lacks merit.

(Append. B, p. A-8).

In the Louisiana Supreme Court, Monts asserted and argued the following assignment of error in his application for writs of certiorari, mandamus, or review filed on March 28, 2002:

The Court of Appeal erred as a matter of law in deciding that Mr. Monts's communications "were not primarily matters of public concern, and thus, not protected speech" under the First Amendment to the U.S. Constitution.

The Louisiana Supreme Court denied Monts's writ application without opinion in an Order issued on May 31, 2002 (Append. A, p. A-1).

REASONS FOR GRANTING THE PETITION

Introduction

This Honorable Court should grant certiorari in this case because the state court has decided a federal constitutional question in a way that conflicts with applicable decisions of this Court. Specifically, the Louisiana court of appeal's decision that Monts' communications to respondents and respondents' attorneys "are not matters sufficiently infused with public interest to support his First Amendment retaliation claim" and that "Monts' internal complaints were not primarily matters of public concern, and thus, not protected speech" conflicts with this Court's decisions that "statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors," *Pickering v. Board of Education*, 391 U.S. 563, 574, 20 L.Ed. 2d 811, 88 S.Ct. 1731, 1737 (1968), and that "Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 416, 99 S.Ct. 693, 696, 58 L.Ed.2d 619 (1979).

Limited Issue of Federal Constitutional Law

This petition for certiorari does not raise issues relating to the factual merits of respondents' motion for summary judgment, which issues the Louisiana court of appeal did not reach. The only issue presented to this Court is a threshold

issue of constitutional law: whether Monts's communications to respondents and their attorneys addressed matters of public concern within the ambit of First Amendment protection. Monts's communications involved reports of fire and safety code violations, the unauthorized practice of engineering, and other unlawful and improper acts on the campus of a public university, and there is no dispute that Monts engaged in such communications. The only disputed issue of fact--the issue the Louisiana court of appeal did not reach--is whether Monts's communications motivated respondents' termination of him. So were this Court to review the state court's limited decision and decide that Monts's communications are entitled to First Amendment protection, this Court would not then be called upon to decide the factual issue of motivation. Rather, this Court need only remand the matter back to the Louisiana Supreme Court for decision on the merits of respondents' summary judgment motion in light of this Court's decision on the issue of federal constitutional law. *Cf. Givhan*, 439 U.S. at 413, 58 L.Ed.2d at 623 (remanding to the Court of Appeals "so that it may consider the contentions of the parties freed from this erroneous view of the First Amendment").

Chilling Effect of the State Court Decision

Whereas respondents effectively silenced the speech of Monts alone, the Louisiana court of appeal's decision will chill the speech of all professional engineers and architects. Under the Louisiana court of appeal's decision in this case, *Monts v. Board of Supervisors* (Append. B, p. A-2), a professional engineer or architect can be terminated at will for complaining about his or her non-technical supervisor's "tendency to overrule or ignore the recommendations of design professionals on issues of architectural and engineering design." And even though the fire and safety codes do not distinguish between "major" and "minor" code violations, under the Louisiana court of appeal's decision in *Monts* a professional engineer or architect can be terminated at will if he reports code violations which his non-technical employer unilaterally deems to be "seemingly minor deviations from the purest building practices" (Append. B, p. A-8). Furthermore, unless a professional engineer or architect

communicates his complaints publicly, rather than privately to his employer or his employer's attorneys, under the Louisiana court of appeal's decision in *Monts* that professional engineer or architect can be terminated at will on the grounds that "all of [his or her] complaints, whether verbal or in memoranda, were internal" (Append. B, p. A-8). As the National Society of Professional Engineers and the Louisiana Engineering Society pointed out in their *amicus curiae* brief to the Louisiana Supreme Court, the court of appeal's decision places all professional engineers and architects--not just Monts--in an intolerable position. After all, the law did not protect David A. Monts, P.E. when he spoke out about what he believed to be engineering design practices which jeopardized the public health, safety, welfare and property, so why should other professional engineers or architects with similar concerns think the law would protect them? Best to keep quiet.

Legal Standard

In reviewing summary judgment, the court must view the evidence presented in light most favorable to the party opposing the motion. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 959 (5th Cir. 1996). In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000), this Court unanimously reaffirmed that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that the inquiry under each is the same." *Id.* at 2110. This Honorable Court held that, although all of the evidence should be reviewed by the court, not all evidence should be given weight; rather, the court "must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.'" *Id.* at 2110 (citation omitted). In the present case, Monts presented evidence that, when taken as a whole, established as a matter of law that his communications to respondents and their

attorneys addressed matters of public concern protected by the First and Fourteenth Amendments.

This Court has observed that "It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, 483 U.S. 378, 383, 97 L.Ed.2d 315, 324, 107 S.Ct. 2891 (1987). This is true "[e]ven though [the employee] could have been discharged for no reason whatsoever . . . ." *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 283, 97 S.Ct. 568, 50 L.Ed.2d 471, 481 (1977). "[S]tatements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors" because "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574, 88 S.Ct. at 1737. The jurisprudence recognizes "our society's strong interest in protecting public employees who have the courage to 'blow the whistle' on wrongdoings in public institutions." *Price v. Brittain*, 874 F.2d 252, 256-57 (5th Cir. 1989). Thus, "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the employees' speech." *Rankin*, 483 U.S. at 384, 97 L.Ed.2d at 324.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S.Ct. 1684, 75 L.Ed.2d 708, 720 (1983). Speech addresses a matter of public concern when it can be "fairly considered as relating to any matter of political, social, or other concern to the community . . . ." *Id.* at 146, 75 L.Ed2d at 719. "The inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n.7, 75 L.Ed.2d at 720 n. 7.

As stated in *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35, "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as

an employer, in promoting the efficiency of the public services it performs through its employees." In what has become known as the *Pickering/Connick* balancing test, "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick v. Myers*, 461 U.S. 138, 150, 103 S.Ct. 1684, 75 L.Ed.2d 708, 722 (1983). Thus, "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.* at 154, 75 L.Ed.2d at 724. In any event, a public employee does not forfeit "his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly." *Givhan*, 439 U.S. at 414. *See also Rankin*, 483 U.S. at 386 n.11 ("The private nature of the statement does not . . . vitiate the status of the statement as addressing a matter of public concern").

Matters of Public Concern

In the present case, Monts's reports of information involving fire and safety code violations, the unauthorized practice of engineering, and other unlawful acts committed and permitted by respondents on the UNO campus clearly and substantially relate to matters "of political, social, or other concern to the community." *Connick*, 461 U.S. at 146, 75 L.Ed2d at 719. Furthermore, as shown herein, an examination of the "content, form, and context" of Monts's communications, "as revealed by the whole record," *id.* at 147-48, 75 L.Ed.2d at 720, confirms that the Louisiana court of appeal construed the First Amendment much too restrictively in deciding that Monts's communications "and are not matters sufficiently infused with public interest to support his First Amendment retaliation claim" and that "Monts' internal complaints were not primarily matters of public concern, and thus, not protected speech" (Append. B, p. A-8).

Significantly, as a result of the Louisiana court of appeal's erroneous resolution of the "public concern" issue, the court did not address "any of the other issues presented by plaintiff, since without protected speech, there can be no violation of the First Amendment" (Append. B, p. A-9). In particular, the court did not reach the issue of whether

Monts's protected speech "was a 'substantial factor'–or, to put it in other words, that it was a 'motivating factor'" in respondents' decision to terminate Monts, *Mt. Healthy*, 429 U.S. at 287, 50 L.Ed.2d 484, and no trier of fact has yet decided the issue of motive or the ancillary issue of pretext. *See Reeves v. Sanderson Plumb. Prod., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 2108-09, 147 L.Ed.2d 105 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose").

Thus, the sole issue presented to this Court is whether Monts's reports of fire and safety code violations, the unauthorized practice of engineering, and other unlawful acts committed and permitted by respondents addressed matters of public concern protected by the First and Fourteenth Amendments to the U.S. Constitution. And again, were this Court to review this limited issue of federal constitutional law and decide that any of Monts's communications addressed matters of public concern within the ambit of First Amendment protection, then this Court, as it did in *Givhan*, 439 U.S. at 413, 58 L.Ed.2d at 623, need only remand the matter to the Louisiana Supreme Court "so that it may consider the contentions of the parties freed from this erroneous view of the First Amendment."

Content, Form, and Context

The Louisiana court of appeal identified "at least four contexts" in which "Mr. Monts alleges that he engaged in protected speech":

> First, he complained at Mr. Parnon's staff meetings about Mr. Schaumbach's and Mr. Cantrell's tendency to overrule or ignore the recommendations of design professionals on issues of architectural and engineering design, and their tendency to implement architectural and engineering design projects without complete review by a design professional. Further, he researched and copied from the

> public record in the UNO library an excerpt from the "UNO 1995-96 Budget," including salary and merit increase information, and made photocopies of the information for four of his colleagues, including Parnon, at their request. Additionally, he reported to Mr. Schaumbach his belief that Mr. Cantrell "has used his position of power to push through projects of special interest to the campus VIPs, especially his boss's boss, Pat Gibbs," and other complaints about Mr. Cantrell's abusive and harassing conduct. Finally, he reported to UNO's attorneys at Phelps Dunbar a host of "problems which needed to be addressed" regarding design standards and code enforcement during two face-to-face meetings with those attorneys.

(Append. B, p. A-7) (footnotes omitted).

With respect to the *content* of Monts's speech, the court of appeal concluded:

> The four instances of allegedly "protected speech" that Monts cites signify his dissatisfaction in the workplace, and are not matters sufficiently infused with public interest to support his First Amendment retaliation claim.

(Append. B, p. A-8). The court of appeal also concluded that "the *context* and *form* of Monts's expression militate against the finding that he was addressing matters of public concern as a citizen, rather than as a disgruntled employee" (Append. B, p. A-8) (emphasis added), reasoning as follows:

> With the exception of the communication with [defendants'] counsel (of which defendants were allegedly unaware), all of Monts'

> complaints, either verbal or in memoranda, were internal and more specifically, internal within the Physical Plant Services Department. He made no complaints to other UNO officials, nor did he report the purported misconduct to the State Board of Ethics, which, as explained in the Staff Handbook, he had the full right to do. Accordingly, it is apparent that Monts' internal complaints were not primarily matters of public concern, and thus, not protected speech.

(Append. B, p. A-8).

As shown herein, an examination of the content, form, and context of each of these four categories of speech compels the conclusion that Monts's communications plainly involved matters of public concern protected by the First and Fourteenth Amendments, and the Louisiana court of appeal, sanctioned by the Louisiana Supreme Court, erred as a matter of federal constitutional law in holding otherwise.

First and Fourth Categories of Speech

In the first category of speech at issue, Monts "complained at Mr. Parnon's staff meetings about Mr. Schaumbach's and Mr. Cantrell's tendency to overrule or ignore the recommendations of design professionals on issues of architectural and engineering design, and their tendency to implement architectural and engineering design projects without complete review by a design professional" (Append. B, p. A-7). In the fourth category, Monts reported similar concerns to UNO's attorneys at Phelps Dunbar, including "a host of 'problems which needed to be addressed' regarding design standards and code enforcement" (Append. B, p. A-8).

As set forth by Monts in his affidavit (Append. F, p. A-28),[4] some of the fire and safety code violations in various

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[4] See also the affidavits of Ehlers (Append. G, p. A-84) and Anderson (Append. H, p. 90), each describing specific instances in which the decisions of UNO officials, namely defendants Schambach and Cantrell, adversely affected the safety and economy of engineering designs for

campus buildings which Monts reported at Parnon's staff meetings and to respondents' attorneys included "No fire alarm system facilities," "No lighted exit signs," "4' X 4' cover is off a section of the power distribution center exposing 'live' electrical parts," "No overcurrent protection for secondary side of transformer provided," "Improper (smaller) wire size used," "Disconnect not labeled," and "Ground wire not in conduit with the A/C conductors." The "Code" Monts cites is the *Louisiana Building Code*, which the Louisiana Legislature adopted in the *Louisiana Building Code for State Owned Buildings Law*, La. R.S. 40:1721 *et seq.*, "[i]n order to assure the public health and safety and to facilitate the efficient use of state funds in the new construction, alterations, additions for renovations of state buildings." La. R.S. 40:1721 (Append. E, p. A-23).

Monts also expressed the following concerns during at least two meetings with respondents' attorneys at Phelps Dunbar:

III. FHS and his boss Patrick M. Gibbs (PMG), Vice-Chancellor, Business Affairs Administration, do not comply with State bid law.

IV. FHS and PMG do not comply with State laws in hiring.

V. FHS practices architecture/engineering without a license, FHS allows other unlicensed persons to practice architecture/engineering, and this practice jeopardizes the health and safety of the public.

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campus projects.

At the end of each meeting with respondents' attorneys, Monts "requested a complete independent investigation of the above matters."

In *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1988), the Tenth Circuit observed that "Speech which discloses any evidence of corruption, impropriety, or other malfeasance on the part of city officials, in terms of content, clearly concerns matters of public import." Examples of other speech which this Court and others have held to address matters of public concern protected by the First Amendment are:

- A teacher wrote a letter to the editor of a newspaper criticizing a school board's handling of revenue proposals and allocation of financial resources between academic and athletic programs. *Pickering*, 391 U.S. at 566, 88 S.Ct. at 1733-34.
- A teacher called a radio station and communicated the substance of a school principal's memorandum regarding a teacher dress code. *Mt. Healthy*, 429 U.S. at 282, 50 L.Ed.2d 480.
- A teacher complained privately to a school principal about what she perceived to be racially discriminatory employment practices and policies. *Givhan* , 439 U.S. at 412-413, 58 L. Ed. 2d at 623.
- A clerical employee in a county constable's office remarked after hearing of an attempt on the life of the President, "If they go for him again, I hope they get him." *Rankin*, 483 U.S. at 397, 97 L.Ed.2d at 321.
- A nursing director at a municipal hospital reported corrupt and wasteful practices to a state inspector. *Rookard v. Health and Hosps. Corp.*, 710 F.2d 41, 46 (2d Cir. 1983).
- An accountant employed by a public university reported "what he thought to be a possible impropriety in the way a faculty member was handling funds." *Brown v. Texas A&M Univ.*, 804 F.2d 327, 329 (5th Cir. 1986).
- An infirmary nurse in a public correctional center reported improper nursing practices to her supervisors,

to the state Board of Corrections, and to the State Board of Nursing. *Frazier v. King*, 873 F.2d 820, 822 (5th Cir. 1989).

- A city police officer aided other city employees in filing grievances about improper promotions. *Thompson v. City of Starkville*, 901 F.2d 456, 457 (5th Cir. 1990).
- A city employee wrote a letter to the editor of a newspaper criticizing the city's residency requirement. *Holder v. City of Allentown*, 987 F.2d 188, 191 (3rd Cir. 1993).
- An internal auditor of a state agency reported favoritism and other improprieties in personnel decisions. *Feldman v. Philadelphia Housing Authority*, 43 F.3d 823, 827-28 (3rd Cir. 1994).
- A teacher criticized a school principle's performance of her duties during a faculty meeting. *Harris v. Victoria Indpt. Sch. Dist.*, 168 F.3d 216, 219 (5th Cir. 1999).

In this case, Monts disclosed to respondents and their attorneys substantial evidence of impropriety and malfeasance on the part of his superiors, including wilful disregard of fire and safety code violations, the unauthorized practice of engineering, violations of state hiring and bid laws, and other unlawful and improper acts, and these communications clearly concerned matters of public import.

Indeed, how the Louisiana court of appeal could conclude that Monts's communications merely "signify his dissatisfaction in the workplace" (Append. B, p. A-8) is not apparent from the opinion or the record. The record contains no evidence to suggest that Monts personally had anything to gain by reporting code violations to his supervisors and to UNO's attorneys. Rather, the specific content of the communications, as well as the form and context of the communications, signify that Monts reported the code violations because of his sincere professional and civic concerns about "continuing hazards to the health, safety and welfare of the public" on the UNO campus (Append. F, p. A-30).

Moreover, Louisiana's *Rules of Professional Conduct for Professional Engineers and Land Surveyors*, LAC 46:2101 *et seq.*, promulgated pursuant to the *Louisiana Registration Law for Professional Engineers and Land Surveyors*, La. R.S. 37:688, required Monts to report his concerns as follows:

> B. Registrants shall at all times recognize that their primary obligation is to protect the safety, health, property, and welfare of the public. If their professional judgment is overruled by nontechnical authority, they will clearly point out the consequences, notifying the proper authority of any observed conditions which endanger public safety and health.

LAC 46:2103(B). *See also* Rule 1 of the *National Society of Professional Engineers Code of Ethics for Engineers* (same); Rule 1 of the *Institute of Electrical and Electronics Engineers, Inc. Code of Ethics* (same); and the *National Society of Professional Engineers Engineer's Creed* (placing "the public welfare above all other considerations").

The *Louisiana Registration Law for Professional Engineers and Land Surveyors*, La. R.S. 37:682(12), further requires licensed professional engineers to be in "responsible charge" of design decisions and defines "responsible charge" as "the direct control and personal supervision of engineering work." Accordingly, § 2103(C)(3) of the *Rules of Professional Conduct for Professional Engineers and Land Surveyors* provides:

> 3. Registrants may not accept the responsibility for, nor review, revise, sign, or seal drawings when such plans are begun by persons not properly registered and qualified; or do any other act to enable either such registrants or the project owners, directly or indirectly, to evade the requirements of R.S. 37:681 through 37:703 [*Louisiana Registration*

Law for Professional Engineers and Land Surveyors].

LAC 46:2103(C)(3).

Thus, fairly considering the content of Monts's speech, the Louisiana court of appeal's decision that Monts's concerns about engineering design standards and fire and safety code enforcement "signify his dissatisfaction in his workplace" makes sense only if one accepts the court of appeal's conclusion that, considering "the context and form of Monts's expression," the "internal" nature of Monts's communications removes them from First Amendment protection (Append. B, p. A-8). But under this Court's decision in *Givhan*, 439 U.S. at 414-16, 58 L.Ed.2d at 623, the fact that Monts arranged "to communicate privately with his employer rather than to spread his views before the public" does not remove his speech from First Amendment protection. *See also Rankin*, 483 U.S. at 386, 97 L.Ed.2d at 326 n.11. Therefore, in holding that Monts's reports of concerns about engineering design standards and safety code enforcement merely "signify his dissatisfaction in the workplace" (Append. B, p. A-8), the court of appeal's express reasoning directly conflicts with decisions of this Court and is constitutionally flawed.

The Louisiana court of appeal further held that Monts's reports of code violations "are not matters sufficiently infused with public interest to support his First Amendment retaliation claim" (Append. B, p. A-8), reasoning as follows:

> In the instant case, review of the alleged code violations with which Monts was concerned--if they were code violations at all--cannot be said to be major matters of public safety. Monts complained of wire size, plumbing, and leveling issues and the like. It would not appear that, even if they were present, these seemingly minor deviations from the purest building practices suggest great threat to the public health and safety.

(Append. B, p. A-8).[5] This reasoning is likewise flawed in several respects.

First, the court of appeal's conjecture as to whether the code violations Monts reported "were code violations at all" is irrelevant to the issue of whether the content of Monts's reports dealt with a matter of public concern. "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth--whether administered by judges, juries, or administrative officials--and especially one that puts the burden of proving truth on the speaker." *New York Times Co. v. Sullivan*, 376 U.S. 254, 271, 84 S.Ct. 710, 11 L.Ed.2d 686 (U.S. 1964). Consequently, even "erroneous statements must be protected to give freedom of expression the breathing space it needs to survive." *Bond v. Floyd*, 385 U.S. 116, 136, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966) (quoted in *Rankin*, 483 U.S. at 387). Thus, in *Conaway*, 853 F.2d at 796, the Tenth Circuit upheld the protected status of Conaway's reports of "facts which *appeared* to involve . . . what he *perceived* to be improper and illegal conduct," and of "circumstances of released substandard electrical work which, he *felt*, posed danger to public life, health, and safety" (emphasis added). *See also Pickering*, 391 U.S. at 572, 88 S.Ct. at 1737 (holding teacher's "erroneous public statements" were protected speech).

Furthermore, the court of appeal cites and the record contains no technical authority or other support for the court's speculation that the code violations Monts reported were not "code violations at all," and the court's layman's opinion that the reported code violations are "seemingly minor deviations from the purest building practices" which "cannot be said to be major matters of public safety" has the effect of trivializing the building codes which the Louisiana Legislature adopted expressly "to insure the public health and safety and to

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[5] Monts did not complain of "plumbing" issues. Monts's complaints were directed to violations of the National Electrical Code and the Life Safety Code, Standard 101. *See* La. R.S. 40:1722(B) (Append. E, p. A-23).

facilitate the efficient use of state funds in the new construction, alterations, additions for renovations of state buildings." La. R.S. 40:1721. There simply exists no authority--technical, legal, or otherwise--for the court of appeal's arbitrary classification of code violations as "minor" or "major." Likewise, there exists no authority for the court of appeal's intimation that reports of "major" code violations might be "matters sufficiently infused with public interest to support his First Amendment retaliation claim" (Append. B, p. A-8), whereas reports of "minor" code violations are not.

On the other hand, the assessment and reporting of code violations was well within the field of expertise of Monts, who at all pertinent times was a licensed Professional Electrical Engineer employed as such in the UNO Department of Physical Plant Services. As such, Monts was bound by professional, ethical, and statutory duties to report what he believed to be violations of the electrical, fire, and safety codes comprising the Louisiana Building Code. *See* La. R.S. 40:1722(B) (Append. E, p. A-23); LAC 46:2103(B) and (C)(3) (Append. E, p. A-27). Furthermore, just as this Court has recognized that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent," *Pickering*, 391 U.S. at 572, 88 S.Ct. at 1736, so courts should recognize that professional engineers are, as a class, the members of a community most likely to have informed and definite opinions as to how the practice of engineering should be conducted to ensure the health, safety and welfare of the public. *Cf. National Soc. of Prof. Eng. v. United States*, 435 U.S. 679, 681, 98 S.Ct. 1335, 1360, 55 L.Ed.2d 637 (1978) ("Engineering is an important and learned profession.") In holding that Monts's reports of code violations are not "matters sufficiently infused with public interest to support his First Amendment retaliation claim" (Append. B, p. A-8), the Louisiana court of appeal failed to accord the opinions of a professional engineer proper weight in the First Amendment balance.

In short, in the first and fourth categories of speech identified by the court of appeal, Monts's communications clearly and substantially addressed matters of public concern, and the court of appeal, sanctioned by the Louisiana Supreme Court, erred as a matter of federal constitutional law in holding they did not.

Second and Third Categories of Speech

In the second category of speech in which Monts engaged--"he researched and copied from the public record in the UNO library an excerpt from the 'UNO 1995-96 Budget,' including salary and merit increase information, and made photocopies of the information for four of his colleagues, including Parnon, at their request" (Append. B, p. A-7)--the "content, form, and context" of Monts's communication, "as revealed by the whole record," *Connick*, 461 U.S. at 147-48, 75 L.Ed.2d at 720, shows that the communication addressed a matter of public concern. First of all, the budget and salary information was contained in the *public record* in the UNO library and reflected expenditures of *public funds*. *Cf. Connick*, 461 U.S. at 143 n.5, 75 L.Ed.2d at 717 n.5 ("The question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present. . . . See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L Ed 2d 328, 95 S Ct 1029 (1975) (action for invasion of privacy cannot be maintained when the subject matter of the publicity is *matter of public record*)") (emphasis added); *Pickering*, 391 U.S. at 572, 88 S.Ct. at 1736 (noting that "the amounts expended on athletics which Pickering reported erroneously were matters of *public record*") (emphasis added). Secondly, Monts's copying of the budget and salary information followed the resignations of two design professionals, Alan W. Anderson, P.E. and George Belteau, P.E., both of whom cited as reasons their low salaries, "increased work load," and "unrealistic schedule," and also followed the rejection of job offers by a series of qualified engineers because of the low salaries offered. The resignations prompted Parnon to complain in a memo to Schambach that "if Engineering is stretched too thin quality

control and life safety may be in jeopardy," and prompted Monts, at Parnon's urging, to remind Gibbs of the design professionals' "imposing responsibility of satisfying Life Safety codes through design as well as inspection of the work." Third, Monts's act of researching and copying the budget and salary information from the public record in the UNO library was in furtherance of his responsibility as the person Parnon officially placed in charge of interviewing applicants for the still-vacant Electrical Engineer position from which Anderson had resigned more than a year earlier in part because of his low salary at UNO.

Lastly, the third category of speech in which Monts engaged--reporting "to Mr. Schambach his belief that Mr. Cantrell 'has used his position of power to push through projects of special interest to the campus VIP's especially his boss's boss, Pat Gibbs,' and other complaints about Mr. Cantrell's abusive and harassing conduct" (Append. B, p. A-8)--also clearly addressed matters of public concern. Monts had no personal stake in reporting what he perceived to be Cantrell's special treatment of Gibbs and other campus officials. Furthermore, Monts did not complain "about Mr. Cantrell's abusive and harassing conduct" toward *himself* but rather toward *other* UNO employees.

And again, that Monts's communications of the public budget and salary information and complaints about Cantrell's improper, abusive, and harassing conduct were "internal and more specifically, internal within the Physical Plant Services Department" (Append. B, p. A-8) does not, contrary to the Louisiana court of appeal's express reasoning, remove those communications from First Amendment protection. *Givhan*, 439 U.S. at 414-16, 58 L.Ed.2d at 623; *Rankin*, 483 U.S. at 386, 97 L.Ed.2d at 326 n.11.

Finally, the facts of this case are quite different from the facts in *Connick*, 461 U.S. at 148, 75 L.Ed.2d at 721, in which the plaintiff, a New Orleans Assistant District Attorney, created a "mini-insurrection" in the District Attorney's office by distributing a questionnaire which reflected "one employee's dissatisfaction with a transfer and an attempt to turn that

displeasure into a cause célèbre." Even when Monts copied the excerpt of the "UNO 1995-96 Budget" and salary information from the public record in the UNO library, he did so "after working hours," gave copies to four colleagues only upon request, only in the context of a staff discussion of "design team staffing for the coming year," and only to provide those who requested it information to "evaluate the staffing and salary situation for themselves rather than relying solely on Mr. Schambach's and Mr. Gibbs' claims that the budget would not permit salary increases."

Furthermore, while the Court in *Connick* found that Meyers' questionnaire "touched upon matters of public concern in only a most limited sense" and that her "limited First Amendment interest . . . does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships," the Court cautioned "that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.* at 154, 75 L.Ed.2d at 724. Here, unlike Meyers' "limited First Amendment interest," *id.*, Monts's First Amendment interest "is entitled to greater weight where he is acting as a whistle blower in exposing government corruption" by reporting code violations, the unauthorized practice of engineering, and other unlawful acts affecting the health, welfare, safety, and property of the public on the UNO campus. *Conaway*, 853 F.2d at 797. To hold otherwise, as the state courts did in this case, would place design professionals like Monts in the position of having to choose between upholding their "primary" professional, ethical, and statutory duties "to protect the safety, health, property, and welfare of the public" on the one hand, LAC 46:2103(B) (Append. E, p. A-27), or on the other hand keeping their mouths shut for fear of losing their jobs.

Finally, in finding Monts spoke not as a "citizen" but as a "disgruntled employee" (Append. B, p. A-8), the Louisiana court of appeal accepted at face value respondents' proffered reasons for terminating Monts--"his continued disruption of departmental meetings, and his negative attitude to his

employment with UNO" (Append. B, p. A-4; Append. I, p. A-94). However, when questioned in depositions, the individual respondents could not identify a single specific instance in which Monts disrupted a departmental meeting, exhibited a negative attitude, or otherwise performed poorly. On the other hand, all of the design professionals, including two professional engineers and a licensed architect, who worked with Monts and attended departmental meetings with Monts confirm that respondents' characterizations of Monts are false. Clearly this is the very situation where "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the employees' speech." *Rankin*, 483 U.S. at 384, 97 L.Ed2d at 324. Respondents used their authority over Monts to silence him, but thus far the courts have not exercised the necessary vigilance to ensure respondents' use of their authority was proper even though all of the evidence in the record establishes it was not.

In sum, all of Monts's communications addressed matters of public concern within the ambit of First and Fourteenth Amendment protection. In any event, while in *Connick* this Court found some of the topics of Myers' speech did not address matters of public concern, the Court nevertheless observed: "Because *one* of the questions in Myers' survey touched upon a matter of public concern, and *contributed* to her discharge we must determine whether Connick was justified in discharging Myers." *Connick*, 461 U.S. at 149, 75 L.Ed.2d at 722 (emphasis added). In finding that *none* of Monts's communications addressed matters of public concern in this case, when as a matter of federal constitutional law all of his communications addressed matters of public concern, the Louisiana court of appeal applied a constitutionally deficient legal standard to impermissibly restrict and erode the freedom of speech, and the Louisiana Supreme Court erred in failing to reverse the court of appeal's decision.

CONCLUSION

Viewing all evidence in light most favorable to Monts in accordance with the applicable standard of review of summary judgments, it could not be clearer that Monts's communications to respondents and their attorneys addressed matters of public concern protected by the First and Fourteenth Amendments. To Monts, the greatest tragedy is that the electrical and life safety code violations he reported may still exist today because respondents, their attorneys, and the Louisiana courts have stifled his speech and trivialized his concerns about code enforcement, thus allowing the continued existence of unnecessary hazards to over 18,000 students, faculty and staff on the UNO campus.

For these reasons, this Court should grant Monts's petition for a writ of certiorari to the Louisiana Supreme Court, should review and reverse the Louisiana Supreme Court's Order denying Monts's application in that court for writs of certiorari, mandamus, or review, and should remand the matter to the Louisiana Supreme Court "so that it may consider the contentions of the parties freed from this erroneous view of the First Amendment." *Givhan*, 439 U.S. at 413, 58 L.Ed.2d at 623.

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